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No. 82-699

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHAMPION PRODUCTS INC.,

Petitioner,

—v.—

UNIVERSITY OF PITTSBURGH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Table of Contents

	Page
Table of Authorities	ii
Argument	1
I. IT IS PITTSBURGH, RATHER THAN CHAMPION, WHICH SEEKS TO SET ASIDE THE FINDINGS OF FACT ACCEPTED BY BOTH COURTS BELOW	1
CONCLUSION	4

Table of Authorities

Cases	Page
General Talking Pictures Co. v. Western Electric Co., 304 U.S. 175 (1938)	3n.
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	3n.
Wagner v. Baird, 48 U.S. (7 How.) 233	4
Rules and Statutes	
Supreme Court Rule 23.1	4
28.1	1n.

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Argument

I

IT IS PITTSBURGH, RATHER THAN CHAMPION, WHICH SEEKS TO SET ASIDE THE FINDINGS OF FACT ACCEPTED BY BOTH COURTS BELOW

Pittsburgh[1] tells this Court that "[w]hat Champion is really seeking is another review of the evidence and the inferences

1 Unless otherwise indicated, all references and abbreviations are the same as in Champion's petition for certiorari. Champion states as follows pursuant to Rule 28.1 of this Court: Champion does not have any parent company, subsidiary other than wholly-owned subsidiaries, or affiliated corporations. However, we note for the Court's informa-

drawn from it" (Brief of University of Pittsburgh in Opposition to the Petition, hereinafter "Brief Opp.", at 7). This statement rests in turn on Pittsburgh's assertion that:

> "Even on the most exuberant view of the evidence Champion, for many years, manufactured soft goods bearing Pitt's name and marks *solely* to fill orders from Pitt's athletic department and book store." (Brief Opp. at 4).[2]

In fact, both the District Court and the Court of Appeals clearly found to the contrary. The District Court found that, beginning in "about 1936", the same year in which Champion began the sale of soft goods to Pittsburgh, "Champion sold Pitt Insignia software *continuously* to others not affiliated with Pitt." Finding 15, 22a, *University of Pittsburgh v. Champion Products, Inc.*, 529 F. Supp. 464, 467 (W.D. Pa. 1982). This finding, like the District Court's other findings of historical fact, 2a, *University of Pittsburgh v. Champion Products, Inc.*, 686 F.2d 1040, 1041 (3d Cir. 1982), was specifically affirmed by the Court of Appeals. 4a, 686 F.2d 1040, 1043. Thus, in order to uphold the Third Circuit's decision on the grounds advanced by Pittsburgh, this Court would have to disregard specific factual findings made by both courts below.

Pittsburgh's position, that "[s]ome ten years later [after 1936], *without notice* to Pitt, Champion apparently *began* selling such goods to others" (Brief Opp. at 4), is therefore

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tion that Reliance Financial Services Corporation, which appears to be a wholly-owned subsidiary of Reliance Group, Incorporated, a publicly owned Delaware corporation, with its principal place of business in New York, New York, has reported that it has acquired more than five percent of the outstanding shares of Champion. Also, Central Trust Company, Rochester, New York, which appears to be a wholly-owned subsidiary of the Irving Bank Corporation, a publicly owned New York corporation, with its principal place of business in New York, New York, holds in its capacity as trustee approximately 23 percent of the outstanding shares of Champion.

2 Unless otherwise indicated, all emphasis in quoted material has been supplied.

wrong on both counts, according to the record as viewed by either court. Such sales to third parties by Champion, as noted above, had begun well prior to 1946, and both courts found that Pittsburgh did indeed have notice of such sales. Findings 20-24, 23a, 529 F. Supp. at 468, affirmed at 23a, 686 F.2d at 1045.

The remainder of Pittsburgh's statements of "fact" do not even purport to rest on anything in the record or in the opinions of either court. They likewise appear to represent mere wishful thinking on Pittsburgh's part, and therefore do not require any specific rebuttal.[3]

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3 Contrary to Pittsburgh's claims, this case is clearly in a similar procedural posture to *National Hockey League v. Metropolitan Hockey Club Inc.*, 427 U.S. 639 (1976), and is properly reviewable now by this Court. Moreover, Pittsburgh's position here that this petition be denied as interlocutory directly contradicts its position in related actions now pending before the Trademark Trial and Appeal Board, wherein Pittsburgh asserted that "[i]n the event that the Supreme Court declines to review the decision of the Court of Appeals then . . . [e]very substantive issue in these oppositions will be conclusively decided against Champion." (Response to Opposer's Motion for Consolidation and Suspension of Proceeding Until Termination of Related Civil Action, Opposition Nos. 65,537, 65,538, and 65,539, dated November 1, 1982 at 6).

Pittsburgh mistakenly invokes the "two court" rule as a bar to review by this Court. Brief Opp. at 7-8 citing, *e.g.*, *General Talking Pictures Co. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). That rule would be applicable only if Champion were asking this Court to upset specific factual findings made by the District Court, and thereafter affirmed by the Court of Appeals. Champion's argument in this Court is the exact opposite: The action of the Court of Appeals in reversing was improper in light of the facts as found by the District Court, and confirmed by the Court of Appeals. To the extent the "two court" rule applies to this case at all, it would support Champion, not Pittsburgh.

CONCLUSION

The Court of Appeals clearly erred and exceeded its authority by ordering the District Court on remand to "grope after the truth of facts involved in the mist and obscurity consequent on the lapse of nearly half a century." *Wagner v. Baird*, 48 U.S. (7 How.) 233, 259 (1849).

WHEREFORE, it is respectfully requested that Champion's petition for writ of certiorari be granted and in addition, or in the alternative, that the judgment of the District Court be summarily reinstated pursuant to Rule 23.1 of this Court.

Dated: New York, New York
December 3, 1982

Respectfully submitted,

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